UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

BELLE KNITTING MILLS, INC.

Employer

and Case No. 29-RD-957

JORGE SANTANA, AN INDIVIDUAL

Petitioner

and

KNITGOOD WORKERS UNION LOCAL 155,
UNION OF NEEDLETRADES, INDUSTRIAL &
TEXTILE EMPLOYEES, AFL-CIO, CLC (UNITE)

Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Marcia Adams, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that Belle Knitting Mills, Inc., herein called the Employer, is a New York corporation with its principal office and place of business located at 145 West Street, Brooklyn, New York, and that it is engaged in the manufacture

of Christmas decorations. During the past year, which period is representative of its annual operations generally, the Employer, in the course and conduct of its business operations, manufactured and sold Christmas decorations valued in excess of $50,000, to employers located outside the State of New York.

Based upon the stipulation of the parties, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated that Knitgood Workers Union Local 155, Union of Needletrades, Industrial & Textile Employees, AFL-CIO, CLC (UNITE), herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

Based upon the stipulation of the parties, and the record as a whole, I find that the Union is a labor organization within the meaning of the Act. The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Jorge Santana, herein called the Petitioner, seeks a decertification election in a unit consisting of all full-time and regular part-time production and maintenance and shipping and receiving employees employed by the Employer at the 145 West Street, Brooklyn, New York, facility, excluding all office clerical employees, guards, and supervisors as defined in the Act. The Employer's position is that the unit sought by Petitioner is appropriate, and the Certification of Representative in Case No. 29-RC-9317 reflects that the Union was certified to represent this same unit on October 5, 1999. The

Union's position (as modified in its brief) is that the unit should include only those employees who were on the Employer's payroll both on November 1, 2000, and on January 30, 2001. The Union contends that this limitation is necessary in order to exclude seasonal employees who have no reasonable expectation of recall. However, the Union did not call witnesses, subpoena the Employer's payroll or personnel records, or submit any other evidence in support of this contention, and its brief did not cite any precedent for applying a comparable eligibility formula.

Testimony by the Employer's President

Beatrice Wetcher, the Employer's president and owner, was called by the Hearing Officer as the only witness to testify at the hearing. Only the Hearing Officer asked questions of this witness. Wetcher testified that the Employer manufactures holiday ribbons and bows, primarily for Christmas. She estimated that as of the date of the hearing, May 1, 2001, the company employed about 147 employees. Of these, approximately 100 to 120 are "core employees" who work for the company year round.[1] The remaining 27 to 47 current employees are seasonal workers who are only hired for the busy season, which runs from late spring to early fall. Seasonal employees work "side by side" with the core employees and are placed in either the Manufacturing Department or the Rework Department.[2] Most are assigned to work during the day shift, from 7:30 a.m. until 4:00 p.m., because there is more supervision than during the night shift (from 4:00 p.m. until 12:30 a.m.). For the most part, the seasonal employees have the same working

[1] During the last two weeks of the year, the company closes down, but a crew of 10 to 25 employees does the inventory and performs maintenance work on the physical plant.
[2] The Rework Department fixes mistakes made in production.

conditions as "core employees"; they are paid in the same manner and work the same hours.

Wetcher maintained that when seasonal employees are first hired, those in the Rework Department are told that they will probably be working until the fall. Those in the Manufacturing Department, who are piece workers, are told that the company needs "people for the summer, but if they're a great producer, they will stay and become an employee, depending on how much they produce." About "five or six" times in the past year, the Employer has asked a highly productive seasonal employee to stay and become a core employee.

Wetcher was unable to estimate what percentage of seasonal employees is recalled in subsequent seasons, because the number of seasonal workers varies. In 2000, there were about 85 seasonal employees, but in some years, she claimed that the number was closer to 150. During the busy season, the first employees to be offered jobs are former employees who are currently collecting unemployment benefits from the company.[3] In addition, Wetcher disclosed that there is a group of 10 to 15 employees who "come back year after year." These employees contact Wetcher's assistant each winter or spring to find out whether there is work available. They either fill out an application, or return to work without filling out an application if there are immediate openings. Wetcher testified that in general, applicants who worked for the Employer previously and performed satisfactorily are given a preference over new applicants. The week of the hearing, for example, Wetcher's assistant, Sandra, had recalled six employees in Department 1, the Manufacturing Department. In addition, within the past two weeks, Wetcher contacted

[3] Wetcher testified that most of the seasonal employees work too short a period of time to be able to collect unemployment.

four employees who were laid off by the Rework Department, of whom one was currently available for work. All ten of these recently contacted employees had called during the winter to ask for work, and Wetcher's assistant had recorded their names and telephone numbers on applications. An undisclosed number of the seasonal workers are newly hired employees; some are recommended by other employees; and others "come in off the street" and fill out applications.

Wetcher testified that at the end of the busy season, the Employer lays off the seasonal employees, telling them there is no more work, or that there are no more orders. She and her assistant, Sandra, inform the seasonal employees that there will probably not be any more work for at least the next six or seven months, and that they should find other jobs rather than waiting for the Employer to call. According to Wetcher, the Employer makes no promises regarding possible recall the following year. Rather, Sandra explains to employees that the Employer cannot predict the next season's volume of orders.

Discussion

Seasonal employees are not eligible to vote in Board elections if they are found to be "temporary employees with no reasonable expectation of future employment." *Macy's East*, 327 NLRB 73 (1998). In assessing the status of seasonal employees, the Board conducts a fact-sensitive inquiry into "such factors as the size of the area labor force, the stability of the Employer's labor requirements and the extent to which it is dependent upon seasonal labor, the actual reemployment season-to-season of the worker complement, and the Employer's recall or preference policy regarding seasonal employees." *Maine Apple Growers, Inc*., 254 NLRB 501, 502 (1981). In that case, the Board stated: "Our decisions establish…that in order to sustain a finding of reasonable

expectation of future employment, if other factors are favorable, the record need establish only that the seasonal employees are permitted to reapply the next season and that some of them are in fact rehired." *Maine Apple Growers, Inc*., 254 NLRB at 503 (citing *Kelly Brothers Nurseries, Inc.,* 140 NLRB 82 (1962)). Accordingly, the Board in *Maine Apple Growers* overruled challenges to the ballots of laid-off apple packers who had been informed that they would not be recalled for at least the remaining eight months of the packing season. *Maine Apple Growers*, 254 NLRB at 502, 503, 505-6. In doing so, the Board relied on evidence that the employer rehired a substantial number of seasonal employees each year, it was completely dependent on seasonal labor, its labor requirements remained relatively stable from one season to the next, and it employed local labor drawn from a small labor pool. *Maine Apple,* 254 NLRB at 502, 503, 505-6.

Two years later, in *L & B Cooling, Inc*., 267 NLRB 1 (1983), the Board applied the criteria set forth in *Maine Apple Growers* to disenfranchise a group of "extra seasonal employees" who had only been hired to process and cool lettuce for one season. There was no evidence of actual season-to-season employment, or of any hiring preference for extra seasonal employees who had worked for Respondent previously. *L & B*, 267 NLRB at 3. In addition, there was no evidence that Respondent encouraged the extra seasonal employees to reapply for employment. *L & B*, 267 NLRB at 3. Moreover, since the labor force from which Respondent drew its extra seasonal employees consisted of "itinerants who travel[ed] throughout the Southwest as the lettuce [was] harvested," its size was "indeterminate" and it was uncertain whether the same group of "itinerants" would return to the Employer's location from one season to the next. *L & B*, 267 NLRB at 2.

More recently, in *Macy's East*, 327 NLRB 73, 74 (1998), the Board found inappropriate a unit of seasonal costume shop employees, employed four to five months per year for the purpose of sewing, cleaning, and storing costumes for the Macy's Thanksgiving Day Parade, because it consisted of temporary employees with no reasonable expectation of future employment. Again applying the *Maine Apple Growers* factors, the Board acknowledged that the Employer was "dependent upon seasonal labor." *Macy's East*, 327 NLRB at 73. However, the Board was unpersuaded by testimony that some employees were told when interviewed that they might be rehired the following year, *Macy's East*, 327 NLRB at 73, since, during these same interviews, the employees were told that their employment would end after the post-parade clean-up process was over. *Macy's East*, 327 NLRB at 73-74. Moreover, the record failed to establish that that "any costume shop employee obtain[ed] permanent employment," that the employer "in fact had a policy of recalling or giving preference in future years to former employees," or that any current bargaining unit member had been employed in any prior year. *Macy's East*, 327 NLRB at 73. Instead of keeping "a list of previously employed costume shop employees for use in future hiring," the Employer placed advertisements each year. *Macy's East*, 327 NLRB at 74. In addition, the Employer's personnel records indicated that the positions were temporary, and the employees were issued temporary identification cards with finite expiration dates. *Macy's East*, 327 NLRB at 74.

By contrast, in *SFOG Acquisition Company, LLC*, 333 NLRB No. 78 (2001), nine laid-off maintenance workers, whom the employer alleged to be seasonal employees, were found eligible to vote. At the time of hire, they were not told that their employment was temporary, but that they would work year-round. *SFOG,* 333 NLRB No. 78 at 1, 1 n.6.

The employer had a policy of marking laid-off seasonal employees eligible for rehire if their work was satisfactory. *SFOG,* 333 NLRB No. 78 at 1. In addition, one maintenance worker testified that at the time of his layoff, he was told he was eligible for rehire.[4] Based on these facts, the Board concluded that the Employer intended to give preference in rehiring to its laid-off maintenance employees, and that they therefore had a reasonable expectation of reemployment. *SFOG* , 333 NLRB No. 78 at 2. In affirming the Regional Director's Decision and Direction of Election, the Board further found that the "seasonal" maintenance employees shared a community of interest with the full-time maintenance employees, in that all maintenance employees performed the same work, at the same locations, worked off the same posted schedule, shared common supervision, and worked approximately the same number of hours. *SFOG,* 333 NLRB No. 78 at 4.

In the instant case, the evidence adduced at the hearing revealed little difference in the working conditions of seasonal and permanent employees, i.e., they who work "side by side," are paid in the same manner and work the same hours (although some seasonal employees are assigned to the night shift). To that extent, the seasonal employees and "core" employees share a common interest in the bargaining unit's terms and conditions of employment. With regard to the criteria set forth in *Maine Apple Growers,* the Employer is dependent on seasonal labor. During some busy seasons, more than half of its work force has consisted of seasonal employees, although there appears to be considerable fluctuation from one year to the next. In its hiring practices, the Employer apparently gives some priority to applications from returning seasonal workers, but the extent to which seasonal employees are recalled in succeeding years is unclear. For

[4] All or most of the other eight disputed employees were not laid off until after they testified in the representation hearing. *SFOG,* 333 NLRB No. 78 at 1.

example, the Employer maintained that employees currently collecting unemployment benefits are the first to be recalled during the busy season, but there is no evidence as to the number of such employees who have been recalled. The Employer divulged that in the last week or two, it has offered seasonal employment to seven employees who were seasonal workers in the past. However, there is no indication as to whether these seven are among the 10 to 15 who are recalled "year after year." It is possible that some seasonal employees have been recalled, but not "year after year." Moreover, there was no testimony regarding the names of the long-term core employees, the newly-hired core employees, the newly-hired seasonal employees, the seasonal employees who have been recalled, or the seasonal employees who are currently on layoff status.

Wetcher testified that when seasonal employees are hired by the Employer, they are told that their jobs are temporary, although those in the Manufacturing Department are also told that they may be hired permanently if their level of production is excellent. Wetcher also contended that when the seasonal workers are laid off, they are advised not to rely on the prospect of future employment opportunities. Based on this testimony, and noting that the size of the area labor force is quite substantial, all or most of the seasonal employees may be temporary workers. However, the employees who were told they were temporary were not identified by name, and none of these employees were called to testify concerning their own version of what the Employer told them. It is worth noting that in *Belle Knitting Mills*, 331 NLRB No. 1 (2000), the Administrative Law Judge credited discriminatees Luz Suarez and Melvin Acosta when they testified, contrary to the Employer's witnesses, that they were never told they were being hired on a temporary basis. *Belle Knitting*, 331 NLRB No. 1 at 7, 8, 24-25. Although they had only worked for

the Employer for two to three months, in 1996, the Board held that the Employer had unlawfully refused to recall Suarez and Acosta from layoff. *Belle Knitting*, 331 NLRB No. 1 at 1, 6, 7, 24-25, 30.

Under the Union's proposed eligibility formula in the instant case, neither Suarez nor Acosta would be allowed to vote in the election if they worked a comparable time period in 2001. The Union's formula would also exclude, *inter alia,* any seasonal employees who are "great producers" and have been recently converted into "core employees," any seasonal employees who work "year after year," and any "core" employees who may have been hired recently, or who may not have been on the payroll on November 1 and January 31 because they were on family leave, sick leave, or temporary disability. The Union's brief cites no precedent for applying a comparable eligibility formula. The cases cited in the Union's brief (other than *Belle Knitting Mills*, *supra,* which is further discussed below) all involve parties attempting to broaden the standard eligibility formula (requiring voters to be employed on the date of the election, and during the payroll period ending immediately prior to the Decision and Direction of Election) to include employees on layoff status at the time of the election. By contrast, the Union is attempting to further restrict the standard eligibility formula, by requiring that voters be employed on two additional dates. The cases relied on by the Union do not set forth the test for finding seasonal employees to be eligible to vote, but the narrower test applicable to employees who are on layoff. Most of the employees the Union seeks to exclude are not on layoff.

The Union's brief also examines some of the allegations made by the Employer in *Belle Knitting Mills*, *supra*, and alleges that the Employer "changes its numbers and has

not defined who, in fact, has a reasonable expectation of recall." Despite any deficiencies in the Employer's testimony, however, the evidence is sufficient to establish that an unknown number of unnamed seasonal workers employed by the Employer are temporary employees with no reasonable expectation of continuing employment, and are thus ineligible to vote in the election. Accordingly, temporary employees will be specifically excluded from the bargaining unit. If the ballots of any seasonal employees are challenged on the grounds that the voters are temporary employees, and the challenged ballots are sufficient in number to affect the results of the election, the employment status of these employees will have to be determined in a post-election hearing.

In conclusion, I find the following bargaining unit to be appropriate for the purposes of collective bargaining:

> All full-time and regular part-time production and maintenance and shipping and receiving employees employed by the Employer at its 145 West Street, Brooklyn, New York, facility, excluding all temporary employees, office clerical employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the

unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether they desire to be represented for collective bargaining purposes by Knitgood Workers Union Local 155, Union of Needletrades, Industrial & Textile Employees, AFL-CIO, CLC (UNITE).

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before May 25, 2001. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to

comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board,

addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by June 1, 2001.

Dated at Brooklyn, New York, May 18, 2001.

/S/ ALVIN BLYER

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